IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

—v.—

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

JOSEPH ARONSTEIN
Attorney for Respondent
1650 Broadway
New York 19, N. Y.

INDEX

SUBJECT INDEX

CASES CITED

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

—v.—

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the District Court (R. 7-34) is reported at 189 F. Supp. 237. The opinion of the Court of Appeals (R. 38-47) is reported at 293 F. 2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1961 (R. 48).

Petition for rehearing *in banc* was denied on September 25, 1961, by the same panel of the Court of Appeals as originally sat on the instant case (R. 49-50). Then, the Court of Appeals, sitting *in banc*, divided three to three on

the petition for rehearing and accordingly denied rehearing on September 26, 1961, for lack of a majority in favor thereof (R. 51-52). An application by petitioner for leave to refile his petition for rehearing *in banc* was denied by all the active judges of the Court of Appeals on October 20, 1961 (R. 53).

The petition for certiorari was filed December 23, 1961, and was granted February 19, 1962.

Statutes Involved

Section 2283 of Title 28 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> "Rule 5. Proceedings before the Commissioner.
>
> (a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without necessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 41(a) of the Federal Rules of Criminal Procedure provides:

> "Rule 41. Search and Seizure.
>
> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located."

Questions Presented

1. Does a judge of the United States District Court have the power (in equity) to enjoin a person (who happens to be employed as an investigation officer by the Waterfront Commission of New York Harbor) from testifying against the respondent in a state criminal case and also in a state administrative proceeding, where such person (petitioner) was present but did not participate in the questioning of the respondent (though he was free to do so if he desired) while respondent was illegally detained by federal customs officers.

2. Whether such injunction is prohibited by the provisions of Section 2283 of Title 28 of the United States Code.

Statement

The order of the District Court herein (R. 35-37) enjoins petitioner Cleary (not in his capacity as an investigator for the Waterfront Commission of New York Harbor) from testifying or producing any evidence against the respondent Bolger (1) in a criminal proceeding pending in the Criminal Court of the City of New York (formerly

the Court of Special Sessions of the City of New York) for the crimes of petit larceny, etc., and (2) in a hearing pending against Bolger before the Waterfront Commission to determine whether to revoke or suspend Bolger's license as a hiring agent and Bolger's registration as a longshoreman. Contrary to the assertion of petitioner that Cleary has no evidence to produce against Bolger, Cleary does in fact have evidence, the confessions made by the respondent which may or may not be competent in the prosecution pending in the Criminal Court of the City of New York and the proceeding pending before the Waterfront Commission. Whether or not the prosecution in the Criminal Court of the City of New York and the proceeding was pending before the Waterfront Commission at the time this injunction was issued or at the time the injunction proceedings were commenced is not in point.

The material facts with respect to the federal officers (including Dorothy Zecchа, stenographer) are: Bolger was arrested September 12, 1959 in the early morning by federal customs agents and held until the evening of that day. The federal agents did not have a warrant for his arrest, nor did they have a warrant to search his person, his automobile or his home in Keansburg, New Jersey. At no time did the Federal agents arraign Bolger before a United States Commissioner or a District Court Judge in the Southern District of New York where he was originally placed under arrest, although a United States Commissioner was on duty in the Court House, Foley Square, City and County of New York. Customs Officers Conlon and Patterson, after observing Bolger carrying cardboard cartons from the pier and placing them in his automobile, followed Bolger after he entered his automobile and ordered him to stop. Bolger stopped. He was ordered from his automobile. Conlon and Patterson proceeded to search his auto-

mobile and found therein empty soda water bottles in the car and in the trunk. In the glove compartment the officers found some spark plugs and window wipers stamped "Made in England". Bolger was taken into custody and they all drove south. Bolger was originally seen at Pier 57, North River, 14th Street. He was stopped at about Christopher Street, North River. The officers stopped at Pier 42, North River and proceeded to make some telephone calls. Bolger asked Officer Patterson for permission to make a telephone call but Patterson refused to permit him to make a call, telling him he would be permitted to call later. They drove to the vicinity of 54 Stone Street and Bolger was taken into the Customs Officer there. Bolger again asked to use the telephone and was again refused. At about 10 o'clock A.M. Agents O'Shea and Loughman arrived at 54 Stone Street. At about 10:30 o'clock, after some preliminary questions, Bolger was taken into a separate room by Officer O'Shea and admitted that he had some thirty or forty bottles of liquor in his home purchased from seamen and also some other merchandise. Later Bolger signed a consent to search his home at 80 Willis Avenue, Keansburg, New Jersey. It was witnessed by O'Shea. (The Court, Bryan, *J.* found that Bolger refused to sign the consent without consulting a lawyer.) About 11:00 A.M. Officers Patterson, Conlon, O'Shea and Loughman, together with Bolger, left 54 Stone Street and proceeded to 80 Willis Avenue, Keansburg, New Jersey. They arrived about noon. At O'Shea's direction Bolger led O'Shea to a bedroom closet where they found some 75 bottles of assorted liquor. O'Shea then searched other parts of the house and found various articles of merchandise. During most of the search Bolger remained in the dining room with one of the other agents and Mrs. Bolger accompanied O'Shea while he continued the search. In Mrs. Bolger's bedroom a Stenorette tape recording

machine was found of West Germany make. The agents and Bolger left for New York at about 2:00 o'clock P.M. after searching for about two hours. The agents took all the merchandise found in Bolger's house. They all arrived in New York at about 4:00 o'clock P.M., and went to 201 Varick Street, Manhattan, headquarters of the Customs Service. The Waterfront Commission of New York Harbor had been advised of Bolger's arrest. About ten minutes later Cleary (petitioner) arrived.

The material facts concerning the petitioner, Cleary, are: the Waterfront Commission was notified by the federal customs officers that the petitioner, Bolger, was in their custody (R. 12-13); Cleary arrived at the Varick Street office of the Customs officers; Customs Officer Loughman and petitioner, Cleary, asked respondent to produce his key ring, and in answer to questions put by Loughman, respondent told him that one key would open the door to a store room in an apartment house at 75th Street and West End Avenue; the respondent was taken by both Loughman and Cleary to this storeroom and compelled to open the door and a search was made of this storeroom by both Loughman and Cleary. They found nothing that was contraband. Bolger was taken back to Varick Street and there questioned by the federal customs officers in the presence of petitioner and a stenographer was present who recorded in shorthand the questions put to respondent and the answers made by him. Bolger was released from custody at about 7:30 P.M. after being warned to keep himself available for further questioning. He was never questioned further by the federal customs officers and no charges were made against him by the federal authorities. Although a United States Commissioner was available Bolger was not taken before him, nor was any attempt made to arraign him before any judicial officer. No attempt was made by

the federal officers to obtain a search warrant. Counsel was not available to Bolger, although he requested permission to telephone and secure counsel and on at least two occasions he was refused permission to use a telephone. He (Bolger) was not advised of his right to an immediate arraignment or of his right to secure counsel. Bolger was arrested by the police of New York City about one month later on a charge of Criminally Receiving Stolen Property (Stenorette Tape Recorder found during the search of his home on September 12, in Keansburg, New Jersey). Subsequently the Waterfront Commission filed charges against Bolger and made an Order temporarily suspending his license as a hiring agent and his registration as a longshoreman. Respondent, Bolger, thereafter commenced the action for an injunction and also made a motion for a temporary injunction. Upon the hearing for a temporary injunction, that proceeding was combined with the trial of the action for an injunction. The final decision of the Court (Judge Frederick v.P. Bryan) resulted in an injunction against petitioner, Cleary, enjoining him from giving any testimony or producing any evidence or statements either oral or in question and answer form obtained by him from the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha on September 12, 1959 in any State criminal proceedings against respondent, Bolger, and also, enjoining petitioner, Cleary, from giving any testimony, or producing any statements in question and answer form, or other statements or producing any evidence before the Waterfront Commission of New York Harbor at any hearing or trial conducted by the said Waterfront Commission of New York Harbor against respondent, Bolger.

POINT I

Cleary Became a Federal Agent Acting in Behalf of the United States When He Joined the Federal Customs Agents by Their Invitation and Participated in Their Unlawful Acts.

When the federal agents returned from the house of respondent in Keansburg, New Jersey and brought him to 201 Varick Street, City and County of New York, petitioner, Cleary, joined with the federal customs agents at 201 Varick Street and participated with the federal agents, at their invitation, in certain actions taken by the federal agents.

Cleary aided and abetted federal agent Loughman in the specific act of compelling respondent to empty his pockets; also aided and abetted Loughman in questioning respondent with respect to the various keys on a key-ring taken from respondent's pocket; upon being told that one key fitted the lock to a storeroom located in an apartment house at 75th Street and West End Avenue, City and County of New York, Loughman, together with petitioner Cleary forcibly took the respondent to these premises, compelled him to open the door and search the storeroom. The fact that Loughman and Cleary did not find any contraband in this storeroom does not excuse the illegal actions taken by both Loughman and Cleary. The federal agents combined together and formed a conspiracy to deprive respondent of his constitutional rights. Petitioner. Cleary, joined in this illegal conspiracy when he, together with federal agent Loughman compelled petitioner to empty his pockets; when he together with Loughman questioned respondent with respect to the keys, and upon ascertaining that one key fitted the storeroom compelled respondent to go to

this storeroom, open the door and then Cleary and Loughman conducted a search therein.

Petitioner, in his brief (page 15), states that the granting of the injunction was in conflict with the applicable decisions of this Court. (Citing *Stefanelli* v. *Minard*, 342 U.S. 117.) The *Stefanelli* case is not in point. That case deals solely with the right of the State of New Jersey police officers to use evidence in a criminal prosecution in the State of New Jersey Courts claimed to have been obtained by an unlawful search and seizure.

The facts in this case are entirely different from the *Stefanelli* case. In this case the federal officers violated the Federal Rules. (Rule 5(a) and Rule 41(a) Federal Rules of Criminal Procedure.) Cleary, petitioner, is employed by the Waterfront Commission of New York Harbor. He arrived at Varick Street by the direct invitation of the Federal Officers, as a representative of the Waterfront Commission.

Cleary, after his arrival at Varick Street joined with and aided and abetted the federal officers in committing further acts in violation of the Federal Rules of Criminal Procedure. By joining with the federal officers and committing illegal acts together with the federal officers, Cleary became a federal officer with respect to this case. The fact that he is an investigator employed by the Waterfront Commission is immaterial. As was said, in the opinion of the Court of Appeals, Second Circuit (Clark, *J.*):

> "But the defendant Cleary is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents. If the court can enjoin federal agents from passing on the fruits of their illegal activity to the state, the court has power to make its decree effective by extending the

injunction to any third party invited by the federal agents to witness the securing of statements or other evidence. That the third party happens also to be a state official is not, in our view, an excusing circumstance."

The petitioner, in his brief (page 20, (2)) states:

"The 'insupportable disruption' of state law enforcement proceedings which was referred to in Stefanelli has become a harsh reality in this case. * * * Thus, the State's criminal prosecution and the Commission's revocation proceedings have been both required to mark time for three years pending the outcome of this litigation * * * "

No injunctive relief was asked for or granted against the State of New York, nor against the Waterfront Commission. (A separate action for an injunction was commenced against the Waterfront Commission for an injunction and such action was dismissed. This action was not before the Court of Appeals, no appeal having been taken, and therefore is not before this Court.) (Transcript of Record, pages 33, 34.)

The State of New York is the plaintiff in the action now pending in the Criminal Court of the City of New York (formerly Court of Special Sessions, City of New York, New York County). The General Construction Law, Section 18-a reads:

"§18-a. Criminal Action

A 'criminal action' is prosecuted in the name of the people of the state of New York, as plaintiffs, against a party charged with crime."

The State of New York is free to proceed against the respondent in the criminal prosecution now pending in the Criminal Court of the City of New York. And, so far as the Waterfront Commission is concerned, that body is not enjoined from proceeding with the hearing to determine what, if any, punishment by way of suspension or revocation of respondent's "hiring license" and "registration as a longshoreman" they may decide upon.

The respondent does not know what evidence the District Attorney of New York County may be able to produce against him in the criminal prosecution, nor does the respondent know what evidence may be produced against him on the hearing pending before the Waterfront Commission.

The petitioner in his brief (page 21) states:

> "The disruptive effect which the injunction here would have upon state law enforcement proceedings was cogently pointed out by Judge Anderson in his dissent in the court below, wherein he stated (R. 47):
>
> "* * * Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. * * *"

As heretofore stated, the State of New York is not enjoined from proceeding with the criminal trial, nor is the Waterfront Commission enjoined from proceeding with the hearing. So it would appear that Judge Anderson statement, quoted above from his opinion, is incorrect.

The petitioner, in his brief (page 21) states:

> "An affirmance here would inevitably beget a large progeny of cases seeking to apply or extend this case. It would become a common defense tactic to seek to

delay and obstruct a state prosecution by applying to the federal courts for an injunction."

The securing of the injunction by the relator in this case did not delay the prosecution, if the prosecution had any legal evidence upon which to proceed.

The petitioner, in his brief (page 22) states:

"If federal rights have been violated, those rights may, and should be, asserted in the usual and time-honored manner at law in the state prosecution subject to the ultimate review available in this Court."

This argument may have some merit if a defendant in a criminal case, after being convicted upon illegal evidence could be freed pending the review of his conviction by the appellate courts of the particular state and then finally, if unsuccessful, seek a review in this Court by way of a petition for a writ of certiorari. But as a practical matter, when the time arrived for the defendant to seek a review in this Court, his prison term would have expired and the question would have become academic.

The petitioner's argument would seem to indicate that he favors the abolition of all injunctions since the issues that could be resolved in an action for an injunction could very well be disposed of in a trial.

The sole question before this Court is: "did Cleary, by aiding and abetting, and acting in concert with the federal agents in their illegal operations, become a federal agent, and thus became amenable to the Federal Rules of Criminal Procedure?" The District Court (Bryan, *J.*) held (Transcript of Record, page 37):

"• • • In effect, Cleary was a human recorder of the questions which were put to Bolger and the answers which he gave.

If no injunction can be issued against Cleary he is in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the Rea case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of Cleary. * * *."

Judge Bryan further said (Transcript of Record, pages 37, 38):

"If Cleary had been a private citizen called in by the federal agents to be a witness to incriminating statements unlawfully obtained from Bolger, he would surely not be insulated against appropriate action by the federal courts to enforce the federal rules. The fact that he was a state agent does not insulate him either or permit him to be used as a shield to enable the federal officers to violate plaintiff's right with impunity. * * * Cleary will be restrained not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States. Such participants are properly within the orbit of the power of the federal courts to enforce the rules against the federal agents owing obedience to them. * * *"

It thus appears, from the opinion rendered by Judge Bryan, that he found that Cleary was, in effect for the purposes of this case, a federal agent.

The opinion of the Court of Appeals, Second Circuit (Clark and Waterman, Circuit Judges, and Anderson, Dis-

trict Judge), Judge Clark said (in the majority opinion) (Transcript of Record, page 40):

> " • • • It is urged that a consideration for the proper balance between the state and federal governments requires the federal court to stay its hand in the present case, lest the work of the state courts be unduly disrupted.
>
> The answer to this contention is that the federal courts will make an exception to this principle of no interference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure. • • • We think the Rea case compels the conclusion that the order below was proper. In Rea, a federal official was disabled from passing the fruits of his illegal activities on to the state through testimony at trial. In the present case the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention. If the integrity of the judicial process stated in the Federal Rules of Criminal Procedure is not to be subverted by the former method, it must be similarly protected against subversion through the latter method. The only difference between the two cases is the time at which the federal officials (fol. 49) attempt to make the results of their law-breaking available to the state. We do not think that this difference justifies a distinction in law, or justifies so easy a means of evading federal law for the protection of the accused. • • • "

The respondent herein relies solely, as he did in the District Court and in the Court of Appeals upon *Rea v. United States*, 350 U.S. 214.

The respondent urges that Cleary, respondent, having joined in with, and aided and abetted the federal agents in their illegal activities, became a principal in the law-breaking activities of the federal agents. Cleary cannot now be heard to say: "I did aid and abet the federal agents in their law-breaking activities. I was present and I heard Bolger make admissions of a very incriminating nature. But, I am a State Official; I am an investigator employed by the Waterfront Commission of New York Harbor. No federal process, injunction or otherwise, can prevent me from using the evidence I secured in a State Proceeding or in a Proceeding before the Waterfront Commission."

If federal agents who flagrantly violate the Federal Rules of Criminal Procedure, can be permitted to call in other persons to aid and abet them in their unlawful activities, and if the persons called in, happen to be state officials, can be permitted to say that they are not amenable to federal process or answerable to the Federal Rules of Criminal Procedure because they are state officials, then the Federal Rules of Criminal Procedure become empty words and meaningless.

Judge Anderson, in his opinion states (Transcript of Record, page 43):

> "While I agree with the majority opinion that Judge Bryan's order should be affirmed, I am of the opinion that, as a result of the intervening decision of the Supreme Court in Mapp v. Ohio, June 19, 1961, the injunction should now be dissolved. I must therefore, dissent from that portion of the majority's decision which continues the injunction in effect."

It would therefore seem that all the Judges of the Court of Appeals are in agreement that there was a clear violation of the Federal Rules of Criminal Procedure.

Judge Anderson further states (Transcript of Record, page 45):

> "* * * To bring the present case within the 'fall-out' area of Rea the majority say 'the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention.' This finding of intent and purpose was never made by the trial court. * * * Nowhere is there anything to indicate that this invitation and cooperation was part of an evil purpose of the federal agents to 'attempt to pass the fruits of their illegal activities on to the state' to promote a prosecution there, which could not be carried out in the federal court."

The respondent urges that Judge Bryan did make a finding that: (1) Cleary became a human recorder of the questions which were put to Bolger and the answers made by him; (2) that Cleary aided and abetted the federal agents when he together with Agent Loughman compelled Bolger to empty his pockets and both did question him about the keys on a key ring. That upon ascertaining that one key fitted the lock on a storeroom located in an apartment building at 75th Street and West End Avenue, Cleary, together with Agent Loughman compelled Bolger to go with them to this address and compelled Bolger to open the door and then Cleary, together with Agent Loughman proceeded to search this room. The fact that no contraband was found does not legalize the unlawful entry and search conducted by Cleary and Loughman (Transcript of Record, as to (1) page 32; as to (2) page 13).

The respondent further urges that Judge Bryan did make a finding that unless Cleary was enjoined he would be in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus "Cleary would become a vehicle to defeat the policy thus enunciated in the Rea case of protecting the privacy of the citizen against invasion in violation of the federal rules" (Transcript of Record, page 32).

The respondent urges that the findings above set forth clearly establish that Cleary would attempt to use the admissions and confessions made by Bolger in his presence to the federal agents in the State criminal proceedings and in the proceedings before the Waterfront Commission, and that Judge Bryan's conclusions are bottomed on the fact that criminal proceedings are pending in the Criminal Court of the City of New York and that proceedings are pending before the Waterfront Commission.

The evidence adduced upon the trial in the District Court established that the federal agents "did have an evil purpose" in that all of their actions were illegal as was found as a fact by the Trial Court. In the opinion of Judge Bryan, he states (Transcript of Record, page 26):

> "I find that Bolger's detention after the commencement of the trip to New Jersey shortly before 11 o'clock in the morning of September 12, 1959 constituted unreasonable delay in bringing him before a commissioner in violation of Rule 5(a) and that such unreasonable delay continued until he was released at 7:30 P.M. some 8½ hours later, without any charges whatsoever having been made against him."

When the federal agents returned with Bolger from New Jersey to 201 Varick Street, New York County, they were

then engaged in illegal activities. Cleary joined the federal agents in their illegal activities at 201 Varick Street about ten minutes after the federal agents arrived at 201 Varick Street (about 4 o'clock P.M.). Cleary continued in the illegal activities, having joined the federal agents, until about 7:20 o'clock P.M.

Judge Anderson further states in his opinion (Transcript of Record, page 45):

> "• • • The most said by the trial court in its finding was, 'The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention.' Later in its discussion the trial court said: 'He (Cleary) was present at the questioning as a representative of the (fol. 54) Waterfront Commission • • • This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront.' • • • •"

This statement found in the opinion of Judge Bryan (Transcript of Record, pages 12, 31), certainly does not mean that illegal cooperation between the Customs Service and the Waterfront Commission is commendable. This statement of Judge Bryan is a general statement, and does not apply to this case, since in this case the federal agents were engaged in illegal activities and Cleary joined together with them in their illegal activities.

Judge Anderson states, in his opinion (Transcript of Record, page 44):

> "There is no question that in the present case Bolger's confession was procured through violations of Rule 5(a) F.R. Crim. P. and of the Fourth Amendment. • • •"

Since there can be no question that the federal agents were engaged in illegal activities and that Cleary joined with the federal agents in their illegal activities, there can be no doubt that Judge Bryan, in speaking about the "commendable cooperation between the Customs Service and the Waterfront Commission" means the legal cooperation. Certainly not "illegal cooperation".

Judge Anderson further states in his opinion (Transcript of Record, pages 45, 46):

> " • • • Cleary was not present at the confession merely as a casual by-stander or as a witness or as a 'human recorder'; he was a law enforcement officer of the State of New York, present in the course of his official duties."

It may be true that Cleary was present in the capacity of a law enforcement officer of the State of New York, present in the course of his official duties, but when he joined with the federal agents in their unlawful acts, he, in effect became a federal agent, since the unlawful acts engaged in by the federal officers were done on behalf of the United States.

Judge Anderson, in his opinion, then goes on to say (Transcript of Record, page 46):

> "There was good reason at the time of the issuance of the injunction by the trial court, before the Supreme Court's holding in Mapp v. Ohio, supra, to include within its reach, Cleary, the state official, to prevent a violation of Bolger's constitutional rights, for Bolger then had no other recourse. • • • "

From the above statement the only fair inference that can be drawn is that Judge Anderson did find that Cleary

joined with and engaged in the unlawful activities of the federal agents.

It would seem that the only difference of opinion between the majority opinion and Judge Anderson's opinion is that on the one hand, the majority opinion believes that *Mapp* v. *Ohio, supra*, does not protect Bolger against the danger of having Cleary testify with respect to his confessions, and, on the other hand, Judge Anderson believes that the Federal Rules do not permit a Federal Court to enjoin a person from testifying in a State Court criminal proceeding or in a proceeding before the Waterfront Commission, even though such person has joined with and engaged in unlawful activities with federal agents in violation of the Federal Rules of Criminal Procedure. Judge Anderson is of the opinion that whether a person can be prevented from testifying in a State criminal proceeding and before the Waterfront Commission is solely a question to be decided by a particular State, and any action by a Federal Court is an invasion of the rights and powers of states. (See Transcript of Record, page 46.)

It would seem that Judge Anderson is of the opinion that the law should be made clear whether state agents can be enjoined in the use of all evidence obtained by state agents illegally under federal rules, when, as in this case, state agents have been called in by federal agents to aid and abet such federal agents in their illegal activities, or whether the admissibility of such evidence in a State Criminal Proceeding and a proceeding before the Waterfront Commission should be left wholly in the power of the state courts.

Judge Anderson seems to be of the opinion that the majority opinion, which leans towards the former principle, means that in every case where there has been any

degree of "commendable cooperation" between federal and state enforcement officers and there are involved federal constitutional rights which the states must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so (Transcript of Record, page 46).

Petitioner urges that the majority opinion and the opinion of Judge Bryan (District Court) does not hold that there has been "commendable cooperation". In fact, the holding is otherwise. The holding is that the actions of the federal agents and Cleary, acting together and in concert, were unlawful. If the District Court and the Court of Appeals had found that what the federal agents and Cleary did resulted in "commendable cooperation" they would have praised their actions, and would not have termed them "illegal and unlawful".

Furthermore, the injunction does not run to the criminal proceedings pending in the New York State Criminal Court or to the proceeding pending before the Waterfront Commission. Each of the proceedings pending in the State Criminal Court and before the Waterfront Commission may proceed. It may very well be that without the testimony of Cleary and the federal agents the State of New York, who is the plaintiff in the criminal action pending in the Criminal Court of the City of New York (formerly Court of Special Sessions) and which action is prosecuted by the District Attorney of New York County may not be successful in securing a judgment of conviction against Bolger. But that question is not before this Court and was not before the District Court and the Court of Appeals. And the same may be true with respect to the proceedings pending before the Waterfront Commission.

As was said in *Rea* v. *United States*, *supra*, the Court said:

> "• • • The command of the Federal Rules is in no way affected by anything that happens in a State Court • • • "

It would seem therefore that this Court in *Rea* stated they were not concerned with the State prosecution. They were only concerned with the Federal Rules of Criminal Procedure and they will not permit the flouting of these Rules in either federal or state proceedings.

POINT II

The Injunction Does Not Stay the State Prosecution.

The petitioner urges (Brief for petitioner, page 31):

> "The injunction herein against petitioner's testimony in New York's criminal prosecution in effect stays, and has stayed the prosecution. For petitioner's testimony is indispensable to the prosecution and we represent to this Court that, if this injunction stands, New York will be required to dismiss its criminal case against respondent Bolger."

The petitioner, Cleary, is merely a witness in the prosecution pending in New York County against Bolger. The District Attorney of New York County is required by law to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed. (County Law, Section 200, Subd. 4.)

It is not for the petitioner to decide whether his testimony is "indispensable". He cannot act for and make decisions for the District Attorney.

The petitioner, Cleary, is an employee of the Waterfront Commission of New York Harbor, a bi-state agency, with respect to the States of New York and New Jersey. This Commission is not an Agency or Department created by the Legislature of New York State. The Commission, it is true, was set up under the Waterfront Commission Act enacted by the States of New York and New Jersey. (New York Laws, 1953, c. 882, McK. Unconsol. Laws, Sections 6700aa and following; N.J. Laws 1953, c. 203; N.J.S.A. 32:23-1 and following.)

Respondent contends that there is a legal difference between a bi-state agency or department and an agency or department set up by a single state.

Respondent furfher contends that the Waterfront Commission of New York Harbor could not become a legal entity without the Act of Congress. (Act of Congress, August 12, 1953, c. 407, 67 Stat. 541.)

This Act contains all the provisions that are found in the law as enacted by the Legislatures of the States of New York and New Jersey.

An examination of this Act of Congress will reveal that Congress has reserved the right to, "repeal" and "amend" any or all of the provisions.

The petitioner contends that when Congress reserved the right to repeal or amend any provision or all the provisions that this makes the Waterfront Commission of New York Harbor a Federal Agency and as such, this agency is amenable to all the laws of the United States, the Constitution of the United States and also amenable to the Federal Rules of Criminal Procedure.

It therefore follows that Cleary, an employee of the Waterfront Commission of New York Harbor, is amenable

to all of the above laws, rules, and the provisions of the Constitution of the United States.

If this Court agrees that the above is the law then it would not be necessary to answer any other contentions raised in the brief of the petitioner.

The petitioner throughout his brief talks about Section 2283, Title 28, U.S.C.

Petitioner states (Petitioner's brief, page 32):

> " • • • the actual impact of the injunction upon the state court proceedings, rather than the form of the injunction, is perforce controlling under Section 2283. • • • "

Petitioner cites *Hill* v. *Martin*, 296 U.S. 393, 403, and sets forth in his brief an excerpt from that case. In that case this Court said (Petitioner's brief, page 32):

> " • • • It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. • • • It applies alike to action by the court and by its ministerial officers; • • • "

It would seem that this case holds that a Court, or any officers of the Court, cannot be enjoined, unless the case presents facts which bring it within one of the recognized exceptions to Section 2283. The petitioner also cites *Harkrader* v. *Wadley*, 172 U.S. 148, 169 (Petitioner's brief, page 33). It seems that this case talks about officers, attorneys and agents of the State. The petitioner is not an officer, attorney or agent of the State of New York. He is an employee of a bi-state agency.

Petitioner attempts to distinguish *Rea* v. *United States*, *supra*, from this case, in that in the *Rea* case the injunction was clearly ancillary to the prior suppression order and therefore came within the express exception of Section 2283 prohibiting a stay of state court proceedings by a federal court "except * * * where necessary * * * to protect or effectuate its judgments * * * *"

The Court of Appeals (Transcript of Record, pages 41, 42) (Majority opinion) said:

> " * * * Nor can we see any rational justification for holding that the disability from giving testimony in state proceedings, based on the need to protect the integrity of the process stated in the Federal Rules of Criminal Procedure, depends on the existence of a prior federal indictment or suppression order. * * * *"

POINT II-A

Waterfront Commission Is a Bi-state Agency.

As heretofore stated, the petitioner and his attorneys are not State officers. The Waterfront Commission of New York Harbor is a bi-state agency. The Legislature of New York State cannot pass legislation with respect to the Waterfront Commission of New York Harbor that would be legally effective without concurrent action by the Legislature of the State of New Jersey.

With respect to petitioner's Point "B" (Petitioner's brief, page 29) (Paragraph 2) in which he states:

> "Further, upon established principles of administrative law, the instant suit by Bolger to enjoin petitioner's testimony before the Commission is premature since Bolger is required to exhaust his administrative remedies. * * * *"

Respondent's answer to this contention is that he is ready to proceed in the proceedings pending before the Waterfront Commission. The injunction granted against the petitioner is not directed against the Waterfront Commission. They can proceed whenever they are ready. Bolger cannot resort to any remedies he may have until after a hearing and a determination by the Waterfront Commission.

Conclusion

For the aforesaid reasons, it is respectfully submitted that the judgment of the Court of Appeals affirming the judgment of the District Court should be affirmed.

Respectfully submitted,

JOSEPH ARONSTEIN
Attorney for Respondent
1650 Broadway
New York 19, N. Y.

Dated:

September, 1962.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

—v.—

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN ANSWER TO BRIEF OF NEW YORK DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE

Respondent in answer to Point 1 (page 5) urges that the injunction herein does not restrain a state tribunal.

This brief then goes on to say that in the *Rea* case the injunction:

> " • • • such action was not directed towards the evidence itself, but solely towards federal officers as such. • • • "

The writer of this brief completely overlooks the principle of law that makes any person who aids and abets another in any unlawful acts a principal. There can be no

question that in this case Cleary aided and abetted the federal officers in their (and his) unlawful acts. In *Rea*, the injunction was directed against the evidence and also against the federal officer.

The writer of this brief (page 10) states:

> " • • • The entire case against petitioner in the state court would have been made by the testimony of the federal agent based on the illegal search and the illegally seized evidence. • • •" (Referring to the *Rea* case.)

In the case at bar, there is nothing before this Court, nor was there anything in the Courts below, with respect to whether the State could or could not proceed with the criminal trial pending there. The District Attorney of New York County, who is charged by law with the prosecution of all persons charged with the commission of crimes committed in New York County was not made a party to this action in the District Court. There was a motion made before Judge Bryan for a temporary injunction pending the trial of the action for a permanent injunction. (See Transcript of Record, page 9.) This motion for a temporary injunction contained a stay. The Judge who signed the Order to Show Cause for a temporary injunction struck out the stay on the promise of the United States Attorney that the State would not proceed with the criminal action until the proceedings in the District Court were disposed of.

The District Attorney of New York County had notice of these proceedings in the District Court. He did not intervene. He could have but chose not to. The only one who could decide whether to proceed with the criminal prosecution in New York State is the District Attorney.

The writer of this brief further states (page 12):

"The Rea case, however, did not pronounce a general policy by the federal courts 'of protecting the privacy of the citizen against invasion in violation of the federal rules' * * * "

The respondent does not contend that the *Rea* case made the above finding. He, however, does contend that the *Rea* case holds that federal agents and all persons invited by federal agents to participate in their unlawful activities could be enjoined.

Respondent has not answered other contentions raised in this brief for the reason that he believes they are answered in the main brief.

Respectfully submitted,

JOSEPH ARONSTEIN
Attorney for Respondent
1650 Broadway
New York 19, N. Y.